



Selection of Leading Cases

FOR THE USE OF B.L. STUDENTS

(Published under the authority of the University of Calcutta.)

LAW OF EVIDENCE

Supplementary Cases



Published by the
University of Calcutta.
1918



PRINTED BY ATULCHANDRA BHATTACHARYYA

AT THE CALCUTTA UNIVERSITY PRESS, SENATE HOUSE, CALCUTTA



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SELECTION OF LEADING CASES.

LAW OF EVIDENCE.

BENI MADHAB DAS

v.

SADASOOK KOTARY.

[Reported in I.L.R. 32 Cal. 437 (F.B.) s.c. 1 C.L.J. 155=
9 C.W.N. 305.]

The following is the order of reference to Full Bench by
Maclean C. J., Harington and Bodilly J.J.:—

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"The Plaintiff is suing for damages for an alleged breach of contract for the sale and purchase of silver bars. There were several contracts, all in the same form. They are set out in the paper-book. On their face they appear to be ordinary mercantile contracts. The defendant alleges they were merely contracts for differences, and, in effect, were wagering contracts, and he claims to be entitled to go into evidence to prove this. The plaintiff contends that, having regard to the decision of a Division Bench of this Court in the case of *Juggernanth Sewbur v. Ram Dyal*¹, the defendant cannot do this, whilst the defendant urges that he is so entitled, having regard to the observations of their Lordships of the Privy Council in the case of *Kong Yee Lone & Co. v. Lowjee Nanjee*². The case of *Juggernanth Sewbur v. Ram Dyal*¹, was not followed by the Madras High Court in the case of *Eshoor Doss v. Venkata Subba Rau*³, or by the Bombay High Court in the case of *Anup Chand Hem Chand v. Champsi Uger Chand*.

Incidentally the question was touched upon in the case of *J. H. Tod v. Lakhmi Das Pursottam Das*⁴. We incline to the opinion that the case of *Juggernanth Sewbur v. Ram Dyal*¹,

¹ (1883) I.L.R. 9 Cal. 791.

² (1901) 5 C.W.N. 714; L.R. 28 I.A. 239.

³ (1894) I.L.R. 17 Mad. 480 (481).

⁴ (1888) I.L.R. 12 Bom. 585.

⁵ (1892) I.L.R. 16 Bom. 441.



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cannot, in the face of the observations of the Judicial Committee in the case above referred to, be now considered as law.

In these circumstances the question we submit for the consideration of the Full Bench is, whether the decision reported in *Juggernaut Seebux v. Ram Dyal*¹, is now to be regarded as law."

The following judgments were delivered :—

MACLEAN C. J.—The question submitted to us is whether the decision in the case of *Juggernaut Seebux v. Ram Dyal and others*¹ can now be regarded as law. With every respect to the learned Judges who decided that case, I should have been of opinion, apart from the expression of judicial opinion in the case, which I shall refer to in a moment, that, upon the true construction of Sec. 92 of the Indian Evidence Act, and specially having regard to proviso(1) of that section, that case had not been properly decided. It seems to me that the learned Judges have not given sufficient effect to the proviso in question. Without going into detail, it seems to me that it would be very difficult to hold that the case here did not fall within the precise terms of that proviso. But if there were any doubt upon this it seems to me that that doubt is set at rest by the observations of their Lordships of the Judicial Committee in the case of *Kong Yee Lone & Co. v. Lowjee Nanjee*². One can hardly suppose that the learned Judges who then composed that Committee in making the observations they did, could have lost sight of the provisions of Sec. 92 of the Evidence Act, which is as binding in Rangoon, as in Calcutta. Their Lordships say "two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market. The question is of which nature were the dealings which formed the consideration for the notes sued on? Were they for genuine purchase of rice, or only for payment of money

¹ (1883) L.L.R. 9 Cal. 791.

² (1901) 5 C.W.N. 714; L.R. 28 I.A. 239.



by one or the other according to the changes and chances of the market?" How is the Court, in adjudicating on the case to ascertain what the circumstances are or what the real nature of the dealings was, unless the party who sets up that it is a wagering contract is allowed to go into evidence upon the matter? Under Sec. 30 of the Contract Act, agreements by way of wager are void. How is the Court to arrive at a decision whether or not an agreement is void on the ground that it is by way of wager unless it is open to the party, who sets up that it is, to go into the evidence? Upon these grounds I think that the question referred to us must be answered in the negative, namely, that the case mentioned in the question submitted cannot be regarded as law, and that with this intimation of our opinion the case must go back to the Referring Court. The costs of this reference will be left to that Court to deal with.

BRETT J.—I agree with the Chief Justice.

STEPHEN J.—I also agree with the Chief Justice.

MITRA J.—I also agree with the Chief Justice.

WOODROFFE J.—I agree that the question referred to the Full Bench should be answered in the negative. The rule of evidence which is embodied in the first paragraph of Sec. 92 of the Indian Evidence Act pre-supposes the validity of the transactions evidenced by the documents to which that rule is to be applied. If, therefore, that validity is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases, the Court is not bound by what has been described as the mere paper expressions of the parties and is not precluded from inquiring into the real nature of the transaction between them. The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any document.

To prove that a contract is void as by showing that it is an agreement by way of wager is to invalidate it. It has been suggested however, that the only cases in which oral evidence may be given to invalidate a document are those specifically mentioned in proviso (1), namely, fraud, intimidation, illegality,

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want of due execution or capacity, want or failure of consideration or mistake. But, in my opinion, this is not so, as the instances given are not exhaustive but, as appears from the use of the words "such as" are set out by way of illustration only. Assuming then that, as has been argued, the present case does not come within the term "illegality" (which it is unnecessary to consider), it is still within the words of the proviso. The admissibility, therefore, of such evidence as that which the defendant seeks to give in this case is not only not excluded by the general rule which is embodied in Sec. 92 but is expressly recognised by the first proviso to that section.

Messrs. Manuel and Agarwalla Attorneys for the Appellant.

Mr. N. C. Bose Attorney for the Respondent.

NOTE.

The question of admissibility of oral evidence to vary the terms of a written document is one of the most important questions of law of evidence and is governed by §92 Indian Evidence Act. Oral evidence to be admissible in such cases must come under one or other of the provisions of this section. Interpretation of §92 Indian Evidence Act is the subject of this Full Bench case and the two main points decided in the case will be found in the judgment of Sir John Woodroffe J. The questions decided were not new questions. In *Juggernath v. Ram Dyal* (1883) I. L. R. 9C. 791 Mr. Sale (now Sir Stephen G. Sale) argued that, although evidence was not admissible to alter or vary the terms of a written contract, it was admissible for the purpose of showing illegality; but his contention was overruled by the Court. In 1901 the case of *Kong Yee Lone & Co. v. Lawjee Nanjee* (1901) 29 C. 461 s. c. 28 I. A. 239 was decided by the Privy Council. But that case did not in express terms overrule the decision of the Calcutta High Court in *Juggernath v. Ram Dyal*, although no doubt the effect of the Privy Council case is to weaken very much the authority of that case. Then came the case of *Sadasook Kotary v. Beni-madhab Das*, before Mr. Justice Sale in 1904 who on the ground that the case of *Juggernath v. Ram Dyal* was binding on him held that oral evidence in such cases was inadmissible. On appeal the appellate Court referred the matter to a Full Bench. The Judgment of Sale J. and the order of reference will be found in pp. 438, 439 of the report respectively.



AMRITA LAL HAZRA AND OTHERS

v.

KING-EMPEROR.

[Reported in I. L. R. 42 Cal. 957, 995—999 ; 1013—1015 ; 1022—1026. s.c. 21 C.L.J., 331, 353—356 ; 365—367 ; 372—375. = 19 C.W.N. 677, 691—693 ; 700—701 ; 703—705].

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The judgment of the Court was delivered by

MOOKERJEE J.—

* * * * *

At the trial before the Sessions Judge, evidence was adduced by the prosecution to establish that some of the accused had associated with Pulin Behary Das in 1908 or 1910 and that they had been seen from time to time in the premises of the Dacca Anusilan Samiti whereof Pulin Behary Das was the leader. Exception was taken on behalf of the defence, to the admissibility of this evidence, but the objection was overruled. The objection has been reiterated in this Court, and we have been invited to pronounce a decision on the point. Evidence has been adduced to prove that Pulin Behary Das and some of his associates were convicted in 1912 of offences under section 121A of the Indian Penal Code, but no evidence has been given as to the nature of the activities of the Samiti, of the different grades of its members and of the extent of their participation in the ultimate aims and purposes of the society ; proof, in these respects could, indeed, be hardly attempted without reproduction of the voluminous evidence adduced at the trial of the Dacca Conspiracy Case. The defence, however, have elicited in cross-examination of the prosecution witnesses that the activities of the Anusilan Samiti were not known to have been in any way connected with bombs. In these circumstances, we have to decide whether evidence was admissible to prove that some of the present accused had in 1908 or 1910 associated with Pulin Behary Das and had been seen engaged in *lathi* play or in other innocent pursuits on the Samiti premises. In our opinion, the evidence was inadmissible and should have been excluded. The prosecution has relied upon section 14 of the Indian Evidence Act which is in these terms. "Facts showing the existence of any state of minds—such as intention, knowledge, good faith, negligence, rashness, ill-will or



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good-will towards any particular person or showing the existence of any state of body, or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.” But, on behalf of the prosecution, the first explanation to the section, which is absolutely fatal to their argument, has been completely overlooked; “A fact relevant as showing the existence of a relevant state of mind must show that *the state of mind exists, not generally but in reference to the particular matter in question.*” We invited the counsel for prosecution to explain how evidence of association with Pulin Behary Das in 1908 or presence in his Samiti, could have any relevancy with reference to the particular matter in question before us, namely, the intention with which the first four accused had assembled in the room, rented by Sasanka, on the night of the 20th November, 1913; but not even a plausible answer was attempted. Illustrations (i), (j), (o) and (p) also plainly indicate that the contention of the prosecution is not well-founded. Nor can the prosecution derive any assistance from section 15 of the Indian Evidence Act, which is in these terms. “Where there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of *similar* occurrences, in each of which the person doing the act was concerned, is relevant.” Reference, however, was made to a number of judicial decisions which throw light upon the questions in controversy, and particularly to *Attorney General v. Makin*,¹ *Blake v. Albion Life Assurance*,² *R. v. Rhodes*,³ *R. v. Wyatt*,⁴ *R. v. Bond*,⁵ *R. v. Fisher*,⁶ *R. v. Ellis*,⁷ *R. v. Ball*,⁸ *R. v. Rodley*,⁹ *R. v. Shellker*,¹⁰ *R. v. Hunt*,¹¹ *R. v. Geering*,¹² *R. v. Garner*,¹³ *R. v. Cotton*,¹⁴ *R. v. Jones*,¹⁵ *R. v. Ollis*.¹⁶ No useful purpose would be served by an analysis of the special facts of each of these cases, but the principles deducible

¹ (1894) A. C. 57; 17 Cox 704.² (1899) 1 Q. B. 77.³ (1906) 2 K. B. 389.⁴ (1910) 2 K. B. 746.⁵ (1913) 3 K. B. 468.¹¹ (1820) 3 B. & Ald. 566; 22 R. R. 485; 1 St. Tr. N. S. 171.¹² (1873) 12 Cox. 400.² (1878) 4 C. P. D. 94.³ (1904) 1 K. B. 118.⁴ (1910) 1 K. B. 149.⁵ (1911) A. C. 47.¹⁰ (1914) 1 K. B. 414.¹² (1849) 18 L. J. M. C. 215.¹³ (1864) 3 F. & F. 681.¹⁵ (1877) 14 Cox. 3.¹⁶ (1900) 2 Q. B. 758.



therefrom as to the law administered in England, may be briefly formulated. Facts similar to but not part of the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general, inadmissible to prove the main fact or the connection of the parties therewith, is receivable after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. The view we take is consistent with the decisions in *Emperor v. Vyapoory*¹, *Mankura v. Queen-Empress*²; *Baharuddin v. Emperor*³; *Giridhari Lal v. Emperor*⁴; and *Emperor v. Debendra Prasad*⁵. With reference to the case last mentioned, it may be noted that the Court properly declined to follow *R. v. Holt*⁶, which is no longer authority: *R. v. Smith*.⁷ We hold, accordingly, that the evidence of association with Pulin Behary Das and the Anusilan Samiti are irrelevant, for the purposes of proof of the conspiracy charged in this case, and should not have been admitted.

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Considerable stress, however, has been laid by the prosecution upon a list of names in cipher, found in the breast-pocket of a

¹ (1881) I. L. R. 6 Cal. 655;
8 C. L. R. 197.

² (1899) I. L. R. 27 Cal. 139.

³ (1913) 18 C. L. J. 578.

⁴ (1909) 11 Cr. L. J. 428.

⁵ (1909) I. L. R. 36 Cal. 573;
9 C. L. J. 610.

⁶ (1860) Bell 280; 8 Cox, 411.

⁷ (1905) 20 Cox 804;

92 L. T. 208.



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coat claimed by Dinesh as his during the search of the room of Sasanka. The handwriting of this document has not been identified. The cipher list was not put to Jatindra Chandra Majumdar, who had been called to prove the handwriting of Dinesh on two post cards; but it transpired that the document had been shown by the Police to the witness outside Court; upon this, the defence made the legitimate comment that the document had not been put to the witness in Court, because he had failed to recognise the handwriting when it was shown to him outside. We observe, however, that notwithstanding these circumstances, the Sessions Judge proceeded in his judgment, to compare the document with the writing on the post cards, with a view to determine whether it was in the handwriting of Dinesh. This is a course which has not commended itself to high authority: *Barindra v. Emperor*¹, *Kurali Prasad v. Anantaram*.² Whether the cipher list, however, was or was not written by Dinesh himself, is not very material for the present enquiry. It has been deciphered and turns out to be a list of names of persons, who apparently paid a small monthly subscription for some purpose undisclosed. The defence has suggested that this was probably a list of subscribers to the library which Sasanka kept in the room; it has also been urged that, in any event, the list does not connect Dinesh with any criminal conspiracy. This is perfectly true, yet one cannot but observe that it would have materially helped the case for the defence if Dinesh had offered a true explanation of the real nature and purpose of this apparently harmless document, instead of suggesting the very improbable theory that it had been planted in his coat pocket by an unscrupulous Police spy. In this connection reference may usefully be made to the following observations made by Tindal C. J. in *R. v. Frost*.³ "On the part of the prisoner, the learned Counsel who appear for him state, and I think they are justified in so stating, that he is not bound to show what was the object or purpose or intent of the acts that were undoubtedly done by the prisoner at the bar. His Counsel say, the offence charged against him must be proved by those who made the charge, that he stands only to

¹ (1909) 1 L. R. 37 Calc. 467 (503); 14 C. W. N. 1114 (1138).

² (1871) 8 B. L. R. 490 (502); 16 W. R. P. C. 16.

³ (1839) 4 St. Tr. N. S. 85 (443); 9 C. & P. 129; 2 Moody C. C. 140.



hear the evidence that is given against him, and, therefore, he is not bound to show at all or in any way whatever, what his real object or design was. Undoubtedly, the proof of the case against the prisoner must depend for its support, not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing, and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence." In this particular case, however, as we have already said, the document, though in cipher and thus calculate to excite suspicion, does not, when deciphered, incriminate the accused in whose possession it was found. Reference has lastly been made to the fact that the name of Dinesh appears in a list found at the search of the house of one Madan Mohan Bhoomik. This evidence is valueless, but the Sessions Judge has also correctly held that it is not admissible against the accused. Nothing is known of Madan or of his activities, except that his name appears among some disconnected memoranda contained in a note-book found in Sasanka's room, and the mere fact that Madan had chosen to enter the name of Dinesh in a list prepared by him for some unknown purpose, is obviously irrelevant for the purposes of this trial. On a review of the entire evidence, it is plain that the conspiracy charged against Dinesh cannot be supported.

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We may here conveniently deal with four important questions of law, raised and discussed before us in connection with the procedure adopted in the Court below, with regard to the examination of the witnesses and of the accused.

It appears that, in more than one instance, when the prosecution had called a witness to prove a particular point, (for instance, witnesses Rai Mohan Ray and Atul Chandra Das Gupta), the defence directed the cross-examination to



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matters wholly unconnected with the examination-in-chief, but yet relevant for the purposes of the trial. Two questions thereupon arose, *first*, whether in a cross-examination of this description, leading questions could be put to the witness, and, *secondly*, whether the prosecution were entitled to test, by way of cross-examination, the veracity of their own witnesses with regard to the matters elicited by the defence in cross-examination. The answer to these questions must depend upon the provisions of the Indian Evidence Act. Section 138 is in these terms: "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then, (if the party calling him so desires) re-examined."

"The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

"The re-examination shall be directed to the explanation of matters referred to in cross-examination, and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

Section 143 provides as follows:—"Leading questions may be asked in cross-examination."

Section 154 is in these terms: "The Court may, in its discretion, permit the person, who calls a witness to put any question to him which might be put in cross-examination by the adverse party." It is consequently plain that the accused were entitled, in cross-examination, to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified on their examination-in-chief. It is also plain that, in the course of cross-examination of this character, the defence was entitled, in view of the generality of the provision of section 143, to ask leading questions. It is finally obvious that the Court might, in its discretion, under Section 154, permit the prosecution to cross-examine the witness even though, he had been originally called by them, with regard to the matters elicited by the defence. Indeed, in such circumstances, it would be generally an improper exercise of discretion to refuse the prosecution an opportunity to



cross-examine the witness for the purpose indicated. This view is in accord with the law as administered in England. It has been ruled there that though leading question may, in strictness, be put in cross-examination, even though the witness be favourable to the cross-examiner [*Parkin v. Moon*¹], yet when a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back: *R. v. Hardy*². Again, as the cross-examination is not limited to the matters upon which the witness has been examined-in-chief, but extends to the whole case, it would be obviously unfair, to allow the evidence brought out in cross-examination to pass unchallenged: *Morgan v. Brydges*³; *R. v. Murphy*⁴. The question was elaborately reviewed by Shaw C. J. in *Moody v. Rowel*⁵ where the learned Chief Justice summed up his opinion as follows:—
 “There is one authority directly in point, where the objection was taken, and it was decided by Lord Kenyon that such leading question is admissible: *Dickinson v. Shee*⁶. So, in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes and may be fully cross-examined to the whole case, and no distinction is suggested as to the mode of cross-examination: *Morgan v. Brydges*³; *R. v. Brooke*⁷. The weight of authority is in favour of the right to put leading questions under the circumstances stated, and this is confirmed by practice and experience.” As is pointed out in Taylor on Evidence (Art. 1432), in the United States the difficulty is avoided by the adoption of the logically consistent rule that a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his examination-in-chief, and if he wishes to examine him respecting other matters, he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause. (See the judgment of the Supreme Court of the United States delivered by Mr. Justice Story in *Philadelphia and Trenton Railway Coy. v.*

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¹ (1836) 7 O. & P. 409.² (1794) 24 St. Tr. 755.³ (1818) 2 Stark 314.⁴ (1841) 1 Arm. M. & O. 206.⁵ (1835) 17 Pickering 490.⁶ (1801) 4 Esp. 67.⁷ (1819) 2 Stark 472; 20 R. R. 723.



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Stimpson ¹. The view we take is to some extent supported by the decision of the Judicial Committee in *Katagurla v. Yarlagadda* ². It may finally be added that the matter is eminently one in the discretion of the trial Judge, and his decision is practically conclusive: *Price v. Manning* ³; *Rice v. Howard* ⁴.

In the course of the trial before the Sessions Judge, a persistent effort was made by the defence to elicit from individual prosecution witnesses whether he was a spy or an informer, and, also to discover from Police Officials the names of persons from whom they had received information. The Sessions Judge disallowed questions of this character, and, in our opinion the course he adopted was correct. In *R. v. Bernard* ⁵, when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy, Lord Campbell allowed the objection to prevail, on the ground that the question was not relevant, and that the witness was really called upon to draw an inference from facts within his knowledge. Again in *R. v. Smith O' Brien* ⁶, it was ruled that disclosures made by informers, to the Government, the Magistracy or the Police, with the object of detecting and punishing offenders were privileged. Reference was made to the general rule formulated by Eyre C. J. in *R. v. Hardy* ⁷: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for detection of crimes, that those persons who are the channel, by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it." It may now be taken as settled rule that witnesses for the Crown in criminal prosecutions undertaken by the Government are privileged from disclosing the channel

¹ (1840) 14 Peter 448.

² (1902) 6 C. W. N. 513.

³ (1889) 42 Ch. D. 372.

⁴ (1886) 16 Q. B. D. 681.

⁵ (1858) 1 For. & Fin. 240; 8 St. Tr. N. S. 887 (935).

⁶ (1849) 7 St. Tr. N. S. 2 (123).

⁷ (1794) 24 St. Tr. 755 (808, 811).



through which they have received or communicated information : *R. v. Watson*¹ ; *R. v. Richardson*² ; *A. G. v. Briant*³ ; *Marks v. Beyfus*⁴ ; but it has been ruled that a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted : *Webb v. Catchlove*⁵.

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NOTES.

The law of evidence with a view to ascertain individual rights and liabilities in particular cases determines the following questions (I) Relevancy of facts i.e. what sort of facts may be proved in order to establish the existence of the right, duty or liability defined by the substantive law. For the meaning of the word "relevancy" see Woodroffe on Evidence 6th Ed. p. 127. (II) Proof of facts, (III) Production of proof of relevant facts i.e. by whom and in what manner evidence must be produced by which any fact is to be proved. Part III of the Indian Evidence Act deals with the subject of the production of proof of relevant facts under following heads : (i) Burden of proof. (ii) Estoppel. (iii) Witnesses and their examination. (iv) Improper admission and rejection of evidence. Though the evidence of one witness is sufficient for the proof of any fact, that one witness must be a witness competent to testify. The competency of a witness is one thing and the power to compel him to give evidence, which is commonly known as the compellability of a witness is another. This compellability may be either (i) compellability to be sworn or affirmed (ii) compellability when sworn or affirmed to answer questions. Section 138 Evidence Act gives the order of examination of witnesses. See notes on this section in Woodroffe on Evidence. Section 141 Evidence Act defines "leading questions" and § 142 lays down the rule when such questions must not be asked and § 142 when they may be asked. Section 153 provides for the exclusion of evidence to contradict answers to questions testing veracity. For the principle on which this rule is based see Woodroffe on Evidence, 6th Ed. p. 886.

¹ (1817) 32 St. Tr. 1 (100).

² (1863) 3 Fes & Fin. 693.

³ (1846) 15 M. & W. 169 ; 71 R. R. 610.

⁴ (1890) 25 Q. B. D. 494.

⁵ (1886) 3 Times L.R. 159.

GOBINDA CHANDRA SHAHA AND ANOTHER.

v.

DWARKA NATH PATITA.

[Reported in 20 C. L. J. 455 s.c. 19 C. W. N. 489.]

Civil.

1914

The judgment of the Court was delivered by

MOOKERJEE J.—This is an appeal on behalf of the plaintiffs, in a suit for ejectment of the defendant, on the allegation that he held as a tenant of the disputed premises from month to month and had failed to vacate the land in spite of service of notice to quit. The defendant resisted the claim on the ground that his tenancy had not been validly terminated. The Subordinate Judge has given effect to this contention and has dismissed the suit. On the present appeal, three points have emerged for consideration, namely, *first*, was the defendant, as alleged by the plaintiffs, a tenant from month to month, entitled only to fifteen days' notice to quit; *secondly*, was the notice in proper form; and, *thirdly*, was the notice served in accordance with law.

As regards the first question, the case for the defendant is that he took the premises from the commencement of the Bengali year 1306, that the rent was fixed at Rs. 275 a year, and that the period during which the tenancy was to continue was not settled. It is plain that the defendant became a tenant for one year only, for a rent of Rs. 275, because, under section 107 of the Transfer of Property Act, which was in force when the tenancy was constituted, a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent could be made only by a registered instrument. The position, consequently, was that the tenancy would, in ordinary course, expire at the end of the year 1306. The tenant, however, continued in occupation, and the landlords accepted rent from him for 1307; in other words, the tenant held over, the legal effect whereof is deducible from section 116 of the Transfer of Property Act. That section—we quote only so much of it as is applicable to the present case—is in these terms: “if a lessee of property remains in possession thereof after the determination of



the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106." In the case before us, the lease was neither for agricultural nor for manufacturing purposes within the meaning of section 106, as the defendant had taken the property for a stationery shop. The lease was consequently renewed, *prima facie*, from month to month. The question next arises, whether there was "an agreement to the contrary" within the meaning of section 116. As was pointed out by Maclean, C. J. in *Troilokya Nath v. Sarat Chandra*¹, the agreement mentioned means an agreement as to the terms of the holding over. Now, there is no proof of an express agreement as to the terms on which the tenant was to hold over. But it is argued that as the rent was originally agreed to be an annual rent, there was an implied agreement that if the tenant held over, he should hold over from year to year. This argument is obviously fallacious. Let us assume that the mode in which the rent is expressed to be reserved, for example, at so much a year, affords a presumption that the tenancy is of a character corresponding to it: *Wilkinson v. Hall*²; though it is plain that the rule is not of universal application and the presumption of a yearly taking does not always arise from the rent being payable yearly: *Atherstone v. Bostock*³; *Wilson v. Abbott*⁴. The argument for the defendant in substance is that the lease was for one year, coupled with an implied agreement that the tenant would hold over from year to year; that in substance would be a lease from year to year, which under section 107 could not be created except by a registered instrument. In fact, this is an ingenious attempt to substitute for a lease from year to year, a tenancy for one year coupled with an agreement to renew it from year to year: *Muti Lal v. Darjeeling Municipality*⁵. We hold accordingly that there was no "agreement to the contrary" within the meaning of section 116, and that after the expiry of the year for which the tenancy took effect, it was renewed

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¹ (1904) I.L.R., 32 Cal. 123 (127).² (1824) 3 B. & C. 58.³ (1837) 3 Bing. N.C. 508; 43 R.R. 728.⁴ (1912) 17 C. L. J. 167.⁵ (1841) 2 M. & G. 511; 10 L.J.C.P. 115.



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from month to month: *Debendra Nath v. Syama Prasanna*¹; *Durgi Nikarini v. Goberdhan Bose*². Under section 106, this tenancy was terminable by the lessors by fifteen days' notice expiring with the end of a month of the tenancy.

As regards the second question, two objections have been taken to the form of the notice, namely, *first*, that the notice, which was dated the 16th Baishak 1318 and may, for the present purpose, be assumed to have been served on that date, called upon the defendant to vacate the premises 'within' (that is, not later than) the 31st Baishak, 1318; and *secondly*, that the notice was signed on behalf of the first plaintiff by one Bharat Chandra De. These objections are manifestly groundless. A notice served on the 16th Baishak which calls upon the tenant to quit on the 31st Baishak (the last day of that month) gives the tenant fifteen days' notice, excluding the day on which the notice is served and expiring with the end of a month of the tenancy. The case of *Subadini v. Durga Charan*³, upon which much stress has been laid by the defendant, is clearly distinguishable. In that case, the notice was served on the 16th Falgoon and required the tenant to quit the land on the 30th Falgoon. It was contended on behalf of the landlord that if the day on which the notice was served was taken into account, the tenant had fifteen days' notice. This contention was over-ruled, and it was held that he had only fourteen clear days' notice, while he was entitled under section 106 to fifteen clear days' notice. It is plain that the learned Judges took into account the day on which the notice was to expire and excluded from calculation only the day on which the notice was served. The learned judges plainly could not have intended to use the expression 'clear days' in its technical sense that the time is to be reckoned exclusive of both the first and last days: *R v. Herefordshire*⁴, *Liffin v. Pitcher*⁵. The judgment, taken as a whole, indicates conclusively that when they laid down that the fifteen days' notice mentioned in section 106 meant fifteen clear days' notice, they never intended to hold that, in calculating the fifteen days the day on which the notice is served, as also the date on which the notice expires are both to be excluded. This

¹ (1906) 11 C. W. N. 1124.² (1820) 3 B. & Ald. 581.³ (1914) 20 C. L. J. 448.⁴ (1843) 1 Dowling. N. S. 767.⁵ (1900) 1 L. R. 28 Calc. 118;

4 C. W. N. 790.



is in accord with what may be taken as the well-settled rule on the subject: *Ree v. Grafton*¹, *Doe v. Matthews*²; *Poole v. Warren*³. The contention that the notice was not a fifteen days' notice to quit must consequently be overruled. The second objection that the notice was not signed by the first plaintiff is equally untenable. Section 106 requires the notice to be in writing, signed by or on behalf of the person giving it. The notice in this case was signed by Bharat Chandra De, ammuktear of the first plaintiff Haridas Saha. The power of attorney has not been produced, but the defendant admitted that he was the ammuktear. The objection is clearly untenable, as the notice was signed by an authorised agent.

As regards the third question, we have to consider whether the notice was served in accordance with the second paragraph of section 106 which provides as follows: "every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property." In this case, attempt was made by the plaintiffs to comply with the requirements of the law by forwarding a notice to the defendant in a registered cover through the Post Office. The cover was ultimately returned to the plaintiffs by the postal authorities on the allegation that the addressee had refused to accept it. The cover with the notice contained therein, has been produced in the course of the trial. There is no oral evidence to show when the cover was posted, nor has the postal peon been examined to prove when and where the cover was tendered to the defendant. The only oral evidence on the subject is a statement by the agent of the plaintiffs, who pledges his oath that he had given notice by a registered cover. The defendant, on the other hand, asserted in the course of his deposition that the cover in question had never been tendered to him. In these circumstances, the question requires consideration whether the plaintiffs have proved that the notice was tendered either personally to the defendant or to one of his family or servants

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¹ (1852) 18 Q. B. 496; 88 R. R. 678.² (1851) 11 C. B. 675.³ (1838) 8 A. and E. 552 (587.)



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at his residence, at least fifteen days before the expiry of the month of Baishak, that is, not later than the 16th Baishak. The evidence for the determination of this question, consists of the envelope and its contents (the notice). The notice, on the face of it, is dated the 16th Baishak 1318. The envelope is addressed to the defendant "Dwarkanath Patita, P. O. Narayanganj, Bhagawanganj Bazar, Nij Gadi." In a corner is the following endorsement: "from Madanganj, Gobindaachandra Saha; (the second plaintiff). On the three postage stamps affixed to the envelope, we have what purport to be impressions of the seal of the Madanganj Post Office; each bears date the 29th April, 1911 which corresponds to the 16th Baishak 1318. We have also a very faint and almost illegible impression of the seal of the Narayanganj Post Office, dated the 29th April, 1911. We have further an impression of the seal of the Madanganj Post Office dated the 1st May, 1911. In addition, we have two endorsements on the cover in the following terms: (1) "This letter returned as the addressee refused to receive it. No. 5, 29th April, 1911." (2) "Refused and returned to sender. J. C. G. 1st May, 1911."

The first of these endorsements is in Bengali, and the second is in English. The first point for determination is, when was the letter posted? There is, as we have said, no oral evidence on the subject, and we are left entirely to the post marks on the envelope. The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises, may it be inferred from the presence of what purports to be the official mark that the mark was genuinely affixed by an officer of the Post Office concerned. This is a question of authentication and may be answered in the affirmative, though there has been some fluctuation of judicial opinion on the subject. In *R. v. Johnson*¹, an objection to the use of an Irish Post mark as evidence of a posting in Ireland, to the effect that "there was no evidence that either of the papers was received from the Post Office which might have been ascertained by the persons employed in that office," was not sanctioned. In *R. v. Watson*², a post mark was held not sufficient to show posting at the place named. In *Arcangelo v. Thompson*³, a post

¹ (1805) 7 East 65 (66, 70.)² (1808) 1 Camp. 215.³ (1811) 2 Camp. 620 (623).



mark was assumed genuine in proving receipt of a letter in a certain year. In *R. v. Plummer*¹, Post Office marks were used to show that a letter came to a particular office, and similarly in *Hitchon v. Best*² a post mark was presumed to be genuine. In *Fletcher v. Braddyll*³ a post mistress was called to identify a post mark. In *Abbey v. Lill*⁴, Gaselee, J. said: "Where it is disputed, it ought perhaps to be proved, though what might be deemed to amount to proof is not clear." In *Warren v. Warren*⁵, the Post master of one of the offices was called to prove the post mark. In *Shiply v. Todhunter*⁶ and *Stoken v. Collen*⁷, post marks were presumed genuine. But in *Woodcock v. Houldsworth*⁸, it was said that some witness must prove the post mark. In the United States, there are cases in which post marks have been presumed genuine. *New Haven v. Mitchell*⁹, *Burgess v. Clark*¹⁰. The preponderance of judicial authority is in favour of the view that what purports to be the impression of a Post Office seal on an envelope which has been posted, may be presumed to be genuine, at any rate, where its genuineness is not expressly questioned. In the second place, the question arises, whether if the post mark be taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears. The answer has been given in the affirmative. In *Canning's Trial*¹¹, a post mark, verified as authentic by the clerk, was admitted to show that the cover passed through the office on the date of the mark. In *Fletcher v. Braddyll*³, a post mark was used to show that the letter existed on the date thereof. In *Abbey v. Lill*¹², a post mark on the cover was used to show that the enclosed letter was wrongly dated. In *Stoken v. Collin*⁷, a post mark was used to show the hour of posting a notice. These cases show that the post mark, when proved or assumed to be genuine, implies an assertion that the date on the mark is the date of affixing it. In the third place, on the same principle, the post mark is evidence that the place or office mentioned therein was actually

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¹ (1814) Russ. and Ry. 264.² (1819) 2 B. and B. 299.³ (1821) 3 Stark 64.⁴ (1829) 5 Bing. 299 (304).⁵ (1834) 1 C. M. & R. 250.⁶ (1836) 7 C. & P. 680 (686).⁷ (1841) 7 M. & W. 515.⁸ (1846) 16 M. & W. 124.⁹ (1842) 15 Conn. 206 (225).¹⁰ (1851) 3 Ind. 250.¹¹ (1754) 19 How. St. Trial 370.¹² (1829) 5 Bing. 298.



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the place where, it was affixed: *Cunning's Trial* ¹, *R. v. Johnson* ². We may, consequently, infer from the date in the three post marks on the three postage stamps on the cover, that the letter was posted at Madangung on the 29th April, 1911. It is necessary to rely on the date in the post marks, because the mere fact that the notice is dated the 29th April, 1911 does not show that it must have been posted on the same date; as was said in *Phelan v. N. W. Mutual Life Ins. Co.* ³, experience indicates no such uniform connection between the date of a letter and the time of its mailing as to raise an inference that a letter was posted on the day of its date. The next question, which requires consideration, is, when was the cover tendered to the addressee. For this purpose, it would be necessary to know the usual course of mail between the place of posting and the place of receipt, for the inference is, that the article posted was delivered in due course of post: *Pitts v. Hartford* ⁴. We have here no evidence on the subject, and the Court cannot take as matters of public notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time and other like facts involved in such an enquiry: *Wiggins v. Burkham* ⁵. We are, therefore, obliged to rely upon the date in the post mark of the Narayanganj Post Office. This shows that the cover reached that office on the very date it was posted at Madangung i.e. 29th April, 1911; but it does not follow that it was tendered to the addressee on the same date; as was said in *Early v. Preston* ⁶, the date of delivery of an article sent by mail cannot necessarily be inferred from the post mark of the receiving office; this observation applies with special force to registered articles which are delivered by the Post Office only between specified working hours. The plaintiffs are, consequently, driven to rely upon the vernacular endorsement on the cover, and this leads to the question, whether that endorsement is admissible in evidence. The endorsement is not signed; but it is urged that it must have been made by the peon No. 5 who was probably entrusted with the delivery of the letter to the

¹ (1754) 19 How. St. Trial 370.² (1805) 7 East 65 (66).³ (1889) 113 N. Y. 147; 10 Am. St. Rep. 441.⁴ (1895) 66 Conn. 376; 50 Am. St. Rep. 96.⁵ (1869) 10 Wallace 129.⁶ (1855) 1 Patt & H. 228.



addressee. Assume the endorsement to be genuine, but still there remains the question, whether it is admissible in proof of the fact recited therein, namely, that the cover had been tendered to the addressee on the 29th April, 1911, and had been refused by him. This plainly is at best a record of a statement by the peon. Such a statement would have been admissible under section 32 (2) of the Indian Evidence Act, if it had been proved that the peon was dead or could not found or had become incapable of giving evidence or that his attendance could not be procured without an unreasonable amount of delay or expense. No foundation, however, has been laid for the reception of the evidence under section 32 (2). The only other section which deals with statements by persons, who cannot be called as witnesses, namely, section 33, has no application. Nor can any assistance be derived from the group of sections relating to statements made under special circumstances. It cannot be argued with any show of reason that the endorsement is admissible, because it is a statement made by a public officer in the discharge of his duty; our attention has not been drawn to any provision of the Indian Evidence Act which would make a statement admissible on such a ground; indeed, if such a ground for admission of evidence was recognised, section 32 (2) would be superfluous. The inference follows, accordingly, that the vernacular endorsement on the cover mentioned above is not admissible in evidence in proof of the allegation that the cover was tendered to and refused by the addressee on the 29th April, 1911. But it has been argued that this view is opposed to the decision in *Jogendra Chauder v. Dwarka Nath*¹. That case, however, if it be assumed to have been correctly decided, is clearly distinguishable. There a suit was brought for ejectment of a tenant of an agricultural holding, and the question arose whether the tenancy had been terminated, by service of notice to quit. The plaintiffs alleged that they had sent a notice to the defendant in a registered cover, duly posted, which had been returned to them by the postal authorities on the allegation that it had been refused by the addressee. The Courts below held that these facts were proved, but it does not transpire from the judgments, on what evidence this conclusion was based; both Courts, however, held

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¹ (1888) I. L. R. 15 Calc. 681.



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that there was no service of notice, as the defendant had not opened the letter and become acquainted with its contents. The plaintiffs appealed to the Court on the ground that the bare fact of refusal to take and open the registered cover did not entitle the defendant to plead non-service of notice. In the course of the argument for the appellants in this Court, reference was made by their Counsel to section 16 illus. (b) of the Indian Evidence Act and to the cases of *Papillon v. Branton*¹ and *Lutf Ali v. Pearce Mohun*²; the attention of the Court was also drawn to evidence of service of notice; we have not been able to ascertain what particular evidence of service had been given, as after this lapse of time the record must have been destroyed. On the evidence on the record and on the arguments mentioned, the Court made the following observation: "the service of the notice in another form (that is, other than service by actually handing the notice) was, however, proved, having been effected by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the Post Office stating the refusal by the defendant to receive the document. Upon the cases cited before us—*Lutf Ali v. Pearce Mohun*² and *Papillon v. Branton*¹,—and having regard also to section 16 illus. (b) of the Evidence Act, we think that only a cautious doubt could lead us to regard that service as insufficient." It has been argued that the learned judges held solely on what purported to be an endorsement by an officer of the Post Office that the cover had been tendered to and refused by the addressee. If the learned Judges intended to lay this down as a matter of law, it is worthy of note that the question of the admissibility of the endorsement was not argued before them; if there was evidence to show that the peon was dead or not available, the endorsement might be admissible under section 32 (2) of the Indian Evidence Act. In the absence of information as to evidence of service of notice to which the attention of the Court was drawn, we are not prepared to treat the decision as a binding authority in support of the proposition that an endorsement of the description now

¹ (1860) 5 H & N. 518.² (1871) 16 W. R. 223.

before us is admissible in evidence though the requisite conditions for admissibility mentioned in section 32 have not been fulfilled. We may further point out that the wide interpretation suggested by the plaintiffs is not justified by the authorities mentioned in the judgment. Illustration (b) to section 16 is in terms: "the question is, whether a particular letter reached A. The facts that it was posted in due course and was not returned through the dead letter office are relevant." This is very different from the assertion that if the letter is returned with a note thereon by the peon that it had been tendered to and refused by the addressee, the inference follows that it was so actually tendered and refused. The case of *Lootf Ali v. Pearce Mohun*¹ was decided before the Indian Evidence Act came into force and cannot be treated as an authority on the question of the admissibility of evidence under section 32(2); but the facts are so meagrely stated in the judgment that, even treated as such authority, it is quite inconclusive; all that appears is that one of the plaintiffs sent notice to the defendant in a cover which was refused by the addressee, came back to the hands of the sender and was produced in Court. What evidence there was on the point does not appear, but we have the following observation in another part of the judgment: "that letter was forwarded to him by post duly registered and we must presume that it was tendered to him; he therefore cannot take advantage of his refusal to take it." The case of *Papillon v. Branton*² was of a very different character. There the tenant posted a notice to the agent of the landlord on the morning of the 25th March, 1859. The agent was in his office until 6 to 7 o'clock in the evening; he did not receive the letter, but found it the next morning. The jury found upon all these circumstances that as the letter had been posted in the morning and had to be carried from Waterloo Place to the Temple, it must have reached the office of the agent the same evening, probably after he had left. An application was made to set aside this verdict, but the Exchequer Chamber declined to grant a Rule. This, again, is clearly a very different case from that of *Jogendra Chunder v. Dwarka Nath*³. It may be further observed that in a case under

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the Transfer of Property Act, *Subadini v. Durga Charan*¹, where reference is made to *Rajoni v. Hafisounissa*², it was said that service of notice by a registered letter through the Post Office is not necessarily a non-compliance with the provisions of section 106, if there is evidence that the peon tendered or delivered the notice either personally to the party or to one of his family or to his servant. In both these cases, receipts signed by the addressees were produced, and that clearly was sufficient proof of good service. The case of *Ismail Khan v. Kali Krishna*³ does not carry the matter further than *Jogendra Chunder v. Dwarka Nath*⁴. Finally, the decision in *Jogendra Chunder v. Dwarka Nath*⁴, is no authority for the proposition that the cover must be assumed to have been tendered to the addressee on the particular date, if any, which the endorsement may bear. Neither in *Jogendra Chunder v. Dwarka Nath*⁴, nor in *Lutf Ali v. Pearce Mohun*⁵, did any question arise as to the particular date on which the notice had been served. On that question, no assistance can be derived from the principle embodied in section 16 of the Indian Evidence Act, namely that when there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done is a relevant fact. In the case before us, the plaintiffs can succeed only upon proof that on the 29th April, 1911, the cover was tendered either personally to the defendant or to one of his family or servants at his residence and was refused by the defendant. The vernacular endorsement is not admissible for this purpose and cannot be treated as evidence of the events recited therein. Nor would section 114 of the Indian Evidence Act and illustration (f) thereto, which are mentioned in the case of *Mir Topurah Hossein v. Gopi Narayan*⁶ be sufficient to remove the difficulty in the way of the plaintiffs; even if we presume it as likely that the cover was tendered to the addressee, we cannot assume that it was so tendered on the 29th April, 1911, yet such assumption is essential for the success of the plaintiffs. Proof of the fact that a letter correctly addressed has been posted and has not been received back

¹ (1900) L. L. R. 28 Cal. 118;

4 C. W. N. 790.

² (1900) 4 C. W. N. 572.³ (1901) 6 C. W. N. 134 (137).⁴ (1888) L. L. R. 15 Cal. 681.⁵ (1871) 16 W. R. 223.⁶ (1907) 7 C. L. J. 251 (258).



through the dead letter office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee; for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date. We may further point out that the presumption mentioned in section 114 is not a presumption of law but a presumption of fact, and where, as in this case, the defendant pledges his oath that the cover was never tendered to him, we cannot treat the presumption of regularity of official business as conclusive against him. We have finally the not unimportant fact that the cover was addressed to the defendant at his *gadi* or place of business; there is nothing to show that was his residence within the meaning of section 106. We are, consequently, of opinion that the plaintiffs have failed to prove that the notice was duly served on the defendant.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs.

Appeal dismissed.

NOTE.

One of the questions on which lawyers are often consulted is the question of notice to quit, whether 15 day's or a month's or a year's notice to quit should be given is an important question; answer to this question depends on the nature of the tenancy and the construction of § 116 and some other sections of the *Transfer of Property Act* (IV of 1882). After deciding the question of the period for which notice should be given, the lawyer will have to advise how the notice should be served in accordance with law and in this connection an important question of law of evidence, as in this case, may have to be decided. If the notice is not served personally, but sent through the post and comes back to the person who sent the notice with endorsements on the cover, to the effect that the letter was returned as the addressee refused to receive it, the question of admissibility of such endorsements as evidence and of interpretation of § 116 Illus. (b) of the *Indian Evidence Act* has to be decided, as has been done in this case. Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee,

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but proof of the fact that a letter has been duly posted and has been returned by the postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee. The presumption mentioned in §114 of the Indian Evidence Act is not a presumption of law but a presumption of fact, and where the addressee pledges his oath that the cover was never tendered to him the court cannot treat the presumption of regularity of official business as conclusive against him. On the question of interpretation of §32 (2) Indian Evidence Act several cases have been cited and distinguished, the points of difference between these cases should be carefully noted.
